NO. 2825.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

NATIONAL SURETY COMPANY,
a corporation,

Plaintiff,

vs.

COUNTY OF LINCOLN,

Defendant.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States District Court of the District of Montana.

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HON. W. H. POORMAN, Assistant Attorney General, Helena, Montana,

SIDNEY M. LOGAN, Rooms 18 and 19, Conrad Bank Building, Kalispell, Montana,

HON. JAMES M. BLACKFORD, First State Bank Building, Libby, Montana,

Attorneys for Defendant in Error.

NAEGELE PRINTING CO., HELENA, MONT.

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STATEMENT OF THE CASE.

There are a number of inaccuracies in that portion of the brief of the plaintiff in error under the sub-title "The Evidence" pages 9-17 and we will briefly call attention to the main points in as to which we care to controvert the statement. At this time we call the attention of the court to the opinion of the trial court as a fair statement to the facts in the case (record 120-126).

On page 11 of their brief referring to the change of the location of the center pier plaintiffs in error say "this change was made by the direction of the county and over the objection of the Coast Bridge Co., and upon the statement to the county by the Coast Bridge Co. that if constructed at the new location it should be constructed upon the 'force account.' "

There is no evidence in the record that the change was made by the direction of the "County" nor is there any evidence in the record to the effect that it was made "upon the statement to the county to the Coast Bridge Co. that if constructed at the new location it should be constructed upon the 'force account' ". The record shows according to the testimony of the witness Mc Clane (page 103-109) that the change was suggested to him by Mr. Geary that he, Mr. McClane then telegraphed the Bridge Co. concerning Mr. Geary's request and received a telegraphic message from the Co. to the effect that if

the Board insisted to get written instructions and proceed on force account (record pages 109-110).

There is no evidence that the Board insisted nor is there any evidence that the Board at any time even as much as suggested or countenanced the change. It is to be noted also that there was no statement by the Bridge Co. to the County that if the change was made it was to be made on force account. All reference to the change and to the matter of force account are contained in the telegraphic communications between the Bridge Co. and its superintendent in charge and there is no evidence that these messages were communicated to the County or any of its Commissioners. Mr. Geary, one of the County Commissioners at page 112 testified that he called the attention of the superintendant to the fact that he was not constructing the Bridge according to Mr. Whitlock's wishes, Mr. Whitlock being a member of the Coast Bridge Co.

On page 12 of their brief Counsel refer to the clause in the contract providing that if additional concrete should be required in the construction of the pier the county should pay according to a certain scale and that if the full amount of concrete specified should not be required the County should have the benefit of the reduction in price at the rate of $13 per cubic yard, and say in this connection "it was not optional with the contractor to increase or decrease the cost of the bridge by increasing or decreasing the amount of concrete to be used in the bridge or by using or not using piling in the con-

struction of the piers. It was for the contractor to do as directed in those matters by the County." The specifications, page 23, provides that the piers and abutments should be sunk to the elevation called for in the plans; that they shall be made within a timber cofferdam or by any other means that the contractor might see fit to use in order to reach the desired depth and to *conform to the dimensions shown on the plans of these foundations.* The specifications, same page also provide that after excavation is made to the full depth, piles shall be driven inside if so ordered by the "Engineer."

From the foregoing it will be seen that the County had no direction or control over the matter, but the matter of constructing the pier and the option as to piling were both left to the Bridge Co.

Under the laws of Montana there is no such an official as a County Engineer nor is there any law authorizing a Board of Commissioners to supervise the construction of a bridge.

The limit of the powers of the Board in this respect is to enter into the contract, exact the bond or undertaking for the faithful performance of the contract and to inspect the bridge after completion and before payment.

Section 1387 Revised Codes of Montana, limits the power of the Board in this respect and is as follows: "The Board of County Commissioners, may by order, direct the County Surveyor, or any member of said Board, or both the County Sur-

veyor and any member of said Board, to inspect the condition of any high-way or bridge in the County, and the work done thereon, and before payment therefor".

The only "engineer" referred to in the record is Mr. C. W. Raynor who testifies that he was chief engineer of the Coast Bridge Co. at and prior to the construction of the bridge at Rexford.

He drew the plans, and everything regarding the job went through his hands, and during a part of the time he was on the grounds or as he put it, "on the job". See Record 103. It is true that some of the witnesses for plaintiff in error speak of the "County Engineer", but the term is used loosly and unadvisedly, for instance, Mr. Reynor on page 104, testified that he obtained certain information from the "County Engineer of Lincoln County" as before suggested this Court knows as a matter of law that there is no such a person as County Engineer, under the laws of Montana. On page 13 of their brief Counsel referred to Carnegie's "pocket companion" and gives the resisting power of White pine and tamarack piles. This book was not introduced in evidence and the information set forth in the plaintif's brief is no part in the record.

On page 14 of their brief Counsel say that after the excavation was completed for the pier in question *"the County, through its engineer and Board of County Commissioners"* measured the hole and directed the Bridge Company not to put in the concrete after the piling were driven until Commis-

sioner Geary was notified and that Mr. Geary was notified and inspected the piling the concrete was placed, in the same paragraph Counsel say that the man erecting the bridge acted under the direction of the County Commissioners and County Surveyor. It is to be noted that Mr. Duthie the County Surveyor who seems to have visited the site of the bridge, once, and once only, is referred to by the Surety's Company's witnesses in some places as the County, Surveyor and in others as the County Engineer, but whatever Mr. Duthies official title might have been we must take issue with Counsel as to the evidence above set forth.

The witness McClane testified (page 106) first that Mr. Pratt probably measured the hole, he then changed his testimony and said it was Mr. Duthie. There is no evidence that any of the other Commissionrs were present at that time and there is no evidence that the Commissioner present or the Board of Commissioners or any Commissioner instructed or directed the Bridge Co. not to put in the concrete. On page 107, however, Mr. McClane testified that Mr. Geary at some uncertain time told him not to place the concrete until he, Mr. Greary, had been notified, and that he subsequently did notify him.

On page 128 the witness testified that the floor was lowered 3 ft. below the elevation shown on the plans and that this change was made in obedience to a letter received from Mr. Whitlock, President of the Bridge Company. It is true also that Mr.

McClane testified that he was to follow Mr. Geary's instructions but the witness limits the authority to instruct just to one matter, see top of page 108. And it is to be noted also that Mr. McClane did not follow Mr. Geary's instructions in any matter except to noitfy him when the driving of the piling was completed. In all other matters he looked to the Coast Bridge Co. for instructions. The witness Paul D. Pratt, chairman of the Board of County Commissioners, testified on page 97, "that the Coast Bridge Co. had represented to us that they were competent Engineers, Competent construction engineers, and that if pilings were necessary they would so advise us and that if it was nesessary to drive pilings they would drive them. We relied on their judgment and allowed them to proceed with the construction of the pier in the manner which we thought was dictated by their best judgment." He also testified that Mr. Duthie had "not so much to work during construction, as he did during preliminary stages to the location of the bridge and the data in making designs" page 98. Mr. Pratt further testified that the Board did not direct any individual member of the Board to supervise the construction of the bridge nor did the Board or the members of the Board direct the County Surveyor to supervise such construction pp. 98-99.

Counsel calls attention to the testimony of Mr. Raynor to the effect that if the matter of driving the piling were left to him he would not have driven piling at all. The testimony of Mr. Pratt is un-

contradicted and undisputed, and if the members of the Coast Bridge Co. preferred to use their own judgment with reference to driving the piling rather than to consult their Chief Engineer in that respect, the County is not to blame nor can Mr. Raynor shift responsibility from his own shoulders to those of County Surveyor by reason of the fact that a profile of the river bottom was furnished by the County Surveyor, such a profile would show only the proximate depth of the water and the contour of the river bottom at the bridge site and would not indicate the character of the gravel or bedrock, if any, nor take the place of actual soundings which would be necessary to determine how deep the excavation could be made and how far the piling could be driven under the specifications. Mr. Raynor and the members of the Bridge Co. visted the site of the bridge and presumedly procured the necessary data to enable them to act with intelligence and in accordance with the contract.

The evidence is not all before the Court but only so much thereof as is necessary under the ten assignments of error contained in the Bill of Exceptions pages 128-131. And so far as Mr. Geary's opportunity to examine the piling at the time of his visit at the site of the bridge is concerned, we think the finding of the Trial Court is conclusive pp. 122-123.

We think also under the assignments of error and the record as made up the courts findings are conclusive as to the cause of the collapse and the Bridge

Company's responsibility therefore.

On pages 91-92 of the Record the plaintiff objected to the introduction of any testimony tending to show that there was any change or alteration of the contract in question. The question, objection, and ruling are as follows:

> "Q. Mr. Klenck, now, have you any reference there in your papers and documents that you have with you, to the time when a payment was made upon the bridge. I call your attention to page 342 of the minutes of the Board of County Commissioners.
>
> "By Mr. Logan,—I will tell you, Judge Rasch, we will admit that these payments were all made out of the order provided in the contract, if you care to save that time.
>
> "By Judge Rasch,—Then it may be admitted, I imagine, that on the 26th day of November, 1912, an additional ten thousand dollars was authorized to be paid, and was paid to the bridge Company.
>
> "By Mr. Logan,—Yes, we will admit that. Of course, the admission is subject to our objection to the whole testimony relating to payments. As I understood the Court, we can state the grounds of our objection at a later time. One of the grounds is that you have not set up the affirmative defense that entitles this to be admitted.
>
> "By the Court,—You must state your objection, if you have any.
>
> "By Mr. Logan,—The plaintiff objects to this

testimony in addition to the grounds already stated, that there has been no plea, no affirmative plea, setting up an alteration in the contract which would discharge the surety; that it was beyond the power of the County Commissioners to discharge the surety from an obligation required by statute for the construction of a bridge; and upon the further ground that it is an immaterial departure from the contract under the rules laid down by the Supreme Court of the State of Montana, and the Statutes of Montana.

"By the Court.—The objection will be overruled at this time. If the evidence is not competent, the Court will attach no weight to it."

In the opinion rendered by the Court at page 121 is found the following:

"The answer is of denials only."

At this time we earnestly urge that not having pleaded the so-called alterations or changes in the terms of the contract affirmatively, plaintiff in error is in no position to ask this Court to consider such changes or alterations, nor to claim that by reason of the same the surety was discharged.

ARGUMENT.

The first point urged by Plaintiff in Error is that the Complaint alleges the making of a contract on the 18th day of December, 1911, the changing and altering thereof during the month of February, and an Amendment at the trial to the effect that the contract was made on the 18th of December, 1911, and a modification thereof on the 5th day of February, 1912.

It is urged that the bond upon which suit is brought is dated the 20th of December, 1911; reference is made to the contract made on the 18th day of December, 1911, and counsel say:

> "And it is obvious that a bond executed on the 20th day of December, 1911, would have no reference to a changed or new contract made on the 5th day of February following, moreover there is no allegation that the National Surety Company executed any bond to cover a new contract of February 5, 1912, which it is claimed the Coast Bridge Company breached."

And further on they say:

> "We take it that a reading of the Complaint will show no allegation of a respect in which plaintiff complains that the Coast Bridge Company breached the contract of December 18, 1911."

This is the first time that our attention has been called to what appears, from the record, to be a

manifest clerical error, or, at most, inadvertence in preparing the Complaint. It is to be noted first that in respect to the breach assigned in the Complaint, there is no difference between the language of the specifications forming a part of the original contract and the specifications forming a part of the changed or altered contract.

The clause as contained in the later specifications, is found on page 24, being a part of the judgment roll and an Exhibit to the Complaint. The clause contained in the specifications forming a part of the original contract, is found on page twenty-four, and as before suggested, the language of the two clauses is identical. The breach assigned in the complaint is as applicable to one as to the other.

We submit that counsel's objection has come too late, and that he has waived the right to urge, at this time, that there is a variance, or failure of proof, in respect to the contracts. In the first place, under the ruling of the trial court (P. 120) the Complaint is deemed amended to conform to the proof. In the second place it is to be noted that no special Demurrer or Motion to make more definite or certain, was interposed. In the third place, it is to be noted that all of these contracts, bonds and specifications were introduced without objection. On page 85, Louis G. Klenck, County Clerk, testifies:

> "I have with me and now produce the contract made in February, 1912, modifying the original contract."

The Bill of Exceptions, then recites:

> "Said contract with the specifications referred to therein, was produced, and it was thereupon stipulated that a true and correct copy of the same was attached to and made a part of the Complaint in this action."

Thereupon the witness further testifies:

> "I have with me and now produce the bond, executed by the defendant, the National Surety Company."

The record then recites:

> "It was stipulated that a true and correct copy of said bond was attached to and made a part of the Complaint in this action."

See page 86.

The Answer admits the execution of the bond. See page 53, and on page 62, the original Agreement and the plans, specifications, were offered and introduced without objection. At no time was the attention of the trial court or plaintiff directed to the alleged discrepency in the dates, between the bond and the contract, nor was any objection made in any manner to the correctness of the Exhibits as set forth in plaintiff's Complaint. The discrepancy in dates, therefore, is immaterial. The contract of February 5, 1912, (Plaintiff's exhibit "A", pages 8-10) and the Bond (pages 26 to 29) constitute but one instrument and the surety is bound by the recital in the bond to this effect.

"* * * * * * * * * * * *

For the erection, complete of a two span rivited bridge over the Kootenai River at Rexford, Montana, together with three concrete piers; also the lumber and railings for said spans, and all other material, all strictly in accordance with the amended and changed maps, plans and specifications thereof, and according to the term of the contract, aforesaid, *all of which are made a part hereof.*"

There are various discrepencies in the matter of dates. For instance, the bond seems to have been signed on the 20th of December, 1911 (See page 29), and it seems to have been approved by the Chairman of the Board of Commissioners September 9, 1912. The bond distinctly refers, in the body thereof, to the "changed and altered plans", and it refers to the original contract of December 18th, 1911. No evidence was offered showing any other change in the plans, and it is to be assumed that when the sureties attached to and made a part thereof the contract and specifications referred to, the matter of dates was deemed immaterial. It is to be noted that nowhere in the record is it suggested that the particular specifications and contract, attached to the bond, are not in fact the same contract and specifications attached to it at the time of the execution of the bond, and if there is any ambiguity or uncertainty concerning the pleadings in this respect, the plaintiff in error, alone, is responsible for that condition.

It is clearly evident that the date "20th day of December" was inserted erroneously by the Clerk or attorney who wrote the bond. Apparently the bond was copied in part from the original bond given to insure the performance of the contract of December 18th, 1911, as that bond would probably have been dated on or about Dec. 20th, 1911. The original bond of course was surrendered to the Security Company at the time of the execution of the new bond and it therefore does not appear in the record.

Ten specifications of error are set forth in the bill of exceptions. The first three relate to the pleadings and really constitute but one specification. The record nowhere discloses the ground of objection to the complaint, and the objections throughout the record in this respect are general, and we think were properly disposed of by the trial court in the following language:

> "Defendant's objection to any evidence, 'for the purpose of the record * * * simply as a formal matter', no defect being pointed out, was over-ruled as of a class disfavored in that it tends to defeat justice rather than to promote it, the Court stating that if the complaint was defective amendment would be allowed. *If necessary, amendment is deemed made to conform to proof.*" (p. 120). (Italics ours.)

When a cause has been tried, and evidence has been admitted without objection, which tends to prove a material fact which should have been

pleaded, but was not, the deficient pleading will be deemed to have been amended to conform to such proof.

Ellinghouse vs. Ajax Livestock Company, ... Mont. ....., 152 Pac. 381.

Lackman vs. Simpson, 46 Mont. 518, 129 Pac. 325.

Hirschfield vs. Akin, 3 Mont. 442.

Hogan vs. State of Montana, 11 Mont. 498, 28 Pac. 969.

Wilson vs. Harris, 21 Mont. 374, 54 Pac. 46.

Lynch vs. Becktell, 19 Mont. 548, 48 Pac. 1112.

Crowder vs. McDonald, 21 Mont. 367, 54 Pac. 43.

The fifth specification is to the effect that the Court erred in not holding that the surety was released from liability by reason of the defendant in error having made payments on the contract before such payments were due.

The fourth and sixth specifications are to the effect that the Court erred in holding that certain alleged changes and modifications in the contract did not have the effect of discharging the surety.

The seventh specification is to the effect that the Court erred in deciding that the plaintiff was entitled to recover notwithstanding the failure to al-

lege and prove that the plans and specifications had been approved by the War Department.

The eighth specification takes exception to the failure of the county to appoint an engineer or inspector to supervise and superintend the work of construction.

The ninth specification is to the effect that the Court erred in refusing to find in favor of the plaintiff in error for the reason that the contract had reference to a "'two-span riveted bridge * * * together with three concrete piers * * * while the bridge which was built was a two-span pin-connected bridge with one concrete and two tubular piers.'"

The tenth specification is so general as to be no specification at all.

Two general questions present themselves for consideration: First, was the surety discharged by reason of the alleged changes in the terms of the contract? Second, did the clause in the contract to the effect that the contract should not go into effect until the plans and specifications should be approved by the Secretary of War amount to a condition precedent, and was it incumbent upon the defendant in error to allege and prove the performance of such condition before being entitled to recover.

DID THE CHANGES IN THE CONTRACT HAVE THE EFFECT OF DISCHARGING THE SURETY?

In the first place, we submit that every change in

the contract, if change there were, was expressly authorized by the terms of the bond. In this case, the surety company undertook and agreed that the bridge company should construct the bridge according to the terms of the contract, and the plans and specifications; and the bond was and is a part of the contract. One of the recitals in the bond is as follows: "* * * *all strictly in accordance with the amended and changed maps, plans, and specifications therefor, and according to the terms of the contract aforesaid, all of which are made a part hereof".* (See record, page 27). One of the clauses of the contract reads as follows: "Third: Should the county, at any time, order alterations, deviations, additions, or omissions, not hereinabove provided for, from the said contract, specifications or plans, it shall be at liberty to do so, and the same will be added to or deducted from the amount of said contract price, as the case may be, by a fair and reasonable valuation." This clause, we submit, is sufficiently broad to authorize any conceivable change in the terms of the contract, or in the plans or specifications.

But we contend that, independently of this provision, the surety company was not discharged by reason of any of the alleged changes in the terms of the contract, under the rules laid down by both State and Federal Courts in recent years with relation to the discharge and release of sureties, especially sureties for compensation. And we further contend that, in one or two instances where plaintiff in

error alleges a change in the terms of the contract there was in fact no change whatever. For instance, in specification number six, they say, *"The said Court erred in holding and deciding that the defendant National Surety Company was not released and relieved from liability by reason of the change in the location of the center pier and the lowering of the floor of the bridge which constituted material departures from the plan for the construction of the bridge adopted by the contract between said plaintiff and the bridge company."* (Page 129 and 130). There is no evidence in the record that any change such as is mentioned in specification six was ever made. One of the witnesses for the plaintiff in error, R. A. McClayn, who happened to be the superintendent in charge of the construction and an employee of the bridge company, testified that Mr. Garey, one of the County Commissioners, "wanted the location of bridge moved sixteen feet closer to the Rexford side than was done, and a center pier was placed sixteen feet nearer the Rexford side of the river than shown on the plans." (See page 105). And on page 108 the same witness testified that the floor of the bridge was lowered three feet below the elevation shown on the plans to coincide with the shore on the Rexford side. The change, according to the witness (same page), was made after a meeting on the ground at which Mr. Duthie, County Surveyor, Mr. Pratt and Mr. Garey, County Commissioners, and Mr. Whitlock, President of the Coast Bridge Company, were

present and talked the matter over. The witness (page 108) says, I received the letter from the Coast Bridge Company, directing me to make the alteration.' And (on page 109) the witness testified, "When Mr. Garey requested the change in the location of the center pier, I immediately communicated with the bridge company in Portland by telegram." (Witness produces telegram which was offered and received in evidence, and is as follows:

TELEGRAM OCTOBER 17 1912

McCLAYN TO COAST BRIDGE COMPANY.

'Libby Montana Oct 17-12 Coast Bridge Company Portland Oregon Garey contends that extension over banks should practically all be on Rexford side and wants location of piers moved sixteen feet. As they now stand Rexford pier is fifty-two feet from water opposite pier twenty-two feet and located where engineer told me to put them. Will see Pratt and go up with delay ten days to move location fourteen bents false work drove coffer dam.

Ready to dridge wire B. A. McClane.'" (Page 109 and 110).

To this telegram, the witness McClane received the following answer, "October 18, 1912. To B. A. McClane, Libby, Montana: *Consider change of location more expensive than beneficial. If Board insists, get written instructions to proceed under force account.* COAST BRIDGE COMPANY" (Page 110). This is all of the testimony appearing in the record on behalf of the plaintiff in error concerning

this alleged change; but (on page 111, 112, and 113) Mr. Garey gives his version of the several conversations. It must be apparent to the Court that, in respect to the particulars of specification six, there was no change either in the contract or in the plans or specifications. Mr. Garey, under the law well established in Montana relating to the powers of Boards of County Commissioners, had no authority whatever to order or direct any change in the terms of the contract or in the plans or specifications. Neither did Mr. Pratt, individually or acting jointly with Mr. Garey, have such authority. Neither did the so-called County Engineer, acting individually or in conjunction with Mr. Pratt and Mr. Garey or either of them, have any such authority. The fact of the matter is that the Board of Commissioners, as such, in session at the County Seat, might have made a change in the contract or in the plans or specifications which would have been binding on the County, but the individual members of the Board had no such power, and any act of theirs looking toward a change in the terms of the contract would have been a mere nullity.

In case of Williams vs. Commissioners, 28th Montana, at page 365, Supreme Court says ~~to power:~~

> "To bind the county by its contracts, it must act as an entity, and in the scope of its authority. Its members may not discharge its important governmental functions by casual sittings on dry good boxes, or by accidental meetings on the public streets; and its chairman, un-

> less lawfully authorized by the board to do some act, or acts, has no more power than has any other member of the board. The statues do not vest the power of the county in three commissioners acting individually, but in them as a single board; and the board can act only when legally convened. (Paola & Fall River Railway Co. vs. Commissioners, 16 Kan. 302; 7 Am. & Eng. Ency. Law (2d Ed.), 979). And its minutes should be kept in such a manner as to give true and correct information to all inquiring concerning county affairs".

It is to be observed that the instructions to Mr. McClane by the telegram of October 18, 1912, were clearly and specifically to the effect that the changes were not desirable, so far as the bridge company was concerned, and that, if the "Board" insisted on the change to secure a written order and proceed on force account. Mr. McClane's authority was limited by this telegram, and it required, first, that before he make any change, the order should come from the "Board", and not from the individual County Commissioners. Second, That the order should be in writing, and Third, that if the changes were to be made he should proceed on force account, and not otherwise. There is nothing in the record to show that the board ordered the change. There is nothing in the record to show that any written order was made in connection with any such change, and there is nothing to show that any record was kept of the item of wages or other expenses in connection with the change under the direction of the Coast Bridge

Company to the effect that the work should be carried on under force account. So that, as the record stands, the change was made by Mr. McClane without authority, if any such change was made. In this respect, there was a breach of the bond, and a failure to construct the bridge according to plans and specifications. Of course, as the trial court observed, we have no right to, and are not claiming damages on account of this breach; but it is absurd to contend that an unauthorized departure from the terms of the plans and specifications works a discharge of the surety when that is the very contingency, to guard against which, the bond was given.

The ninth specification of error is a follows: "The Court erred in holding and deciding that the plaintiff is entitled to recover, notwithstanding the bond furnished by the defendant National Surety Company has reference to a contract for the construction of a 'two-span riveted bridge * * * together with three concrete piers * * * while the bridge which was built was a two-span pin-connected bridge with one concrete and two tubular piers.' "

It is to be observed that the plaintiff in error had on the stand a number of so-called expert witnesses. But no evidence was offered to show the difference, if any, between a two-span riveted bridge, and a two-span pin-connected bridge. And the Court is asked to say that this so-called change in the terms of the contract was a material change. We submit, in the first place, that there is no proof in the

record that a two-span pin-connected bridge was substituted for a two-span riveted bridge. And if such were the case, and the bridge company constructd a two-span pin-connected bridge while the contract required it to construct a two-span riveted bridge, then the circumstance simply amounts to proof of another breach of the bond, and a violation of the terms of the contract, and the plans and specifications for which the surety would be liable had we asserted or claimed any damage by reason of the substitution. If, as a matter of fact, there is a material difference between a two-span pin-connected bridge, and a two-span riveted bridge, and if as a matter of fact the substitution was made, there is absolutely nothing in the record showing that the county or board of County Commissioners or any person connected with or representing the county was in any manner, directly or indirectly, responsible for the substitution, and the substitution was in direct violation of the clause of the bond to the effect that the bridge company "shall faithfully and truly observe and comply with all the terms, conditions, and provisions of said contract, and the changed and altered plans and specifications mentioned and shall well and truly and faithfully do and perform all matters and things by them undertaken to be performed under said contract." But, as suggested before, the record shows no substitution. The contract, Plaintiff's Exhibit A, (Page 8, 9, and 10), the specifications (Pages 10 to 25, inclusive), and the bond (Pages 26 to 29, inclusive) con-

stitute the extent of the surety company's responsibility and the measure of its liability; and in the specifications (Page 11) we find the following:

"PLAN A.

"Sheet 1. Sheet 1 shows the profile of the Kootenai River near Rexford, Montana, at the proposed site of the bridge. The proposed crossing shown on this sheet suggests a 2-220 pin-connected spans for superstructure, resting on one stream pier and two shore piers, together with the necessary wooden approaches." It is true that the bond (Page 26) says that the contract is "for the erection complete of a two-span riveted bridge at Rexford, Montana, together with three concrete piers." Thus it will be seen that the bond describes a two-span riveted bridge with three concrete piers, while the specifications suggest a 2-220 foot pin-connected span resting on one stream pier and two shore piers. There is apparently no serious conflict between the specifications and the bond. "Riveted" spans probably refer to the manner of constructing the steel spans; and "pin-connected" may refer to the manner of connecting the two spans together. But, be that as it may, the specifications are just as much a part of the surety company's contract as the bond itself, and is made so by reference, and we do not imagine the Court will speculate seriously as to the difference between the two kinds of bridges; and as a matter of fact there is nothing in the record to show what kind of a bridge was actually constructed, whether

it conformed to the type mentioned in the bond or the type mentioned in the specifications.

We submit that the following propositions are uncontrovertable:—

1: That every ~~warranted or empowered permitted~~ change made in the terms ofthe contract was ~~on the face~~, authorized by the clause in the contract authorizing such change, and that by reason of such clause the Surety Company authorized, empowered and constituted the Bridge Company it's Agent, for the purpose of making such changes as might be agreed upon between the County and the Bridge Company.

2: That by virtue of the fact that the laws of the State compel the Board of County Commissioners when making a contract for the construction of a bridge, to require from the Contractor a bond conditioned for the faithful performance of the contract, and no contract made without such a bond is valid or operative, and when once given the bond cannot be released or discharged or the sureties exonerated by any act of the Commissioners which would defeat the purpose of the bond in the first instance.

See Sec. 1413 Revised Codes of Montana, ~~which reads as follows:~~ Supra P. 43.

3: That every change made in the terms of the contract, except those made by express written agreement to which the surety was a party, are immaterial changes and do not result to the damage of the surety or in any manner affect or lessen its

security.

Specification 5 takes exception to the fact that payments were made on the contract before same were due. Resolution, Page 89, recites among other things, that one, Robert Reid, had commenced a suit in equity to enjoin the commissioners from selling it's bonds; that the construction of the bridge was delayed and by reason of such litigation the Bridge Company was embarrassed, owing to the fact that it had fabricated considerable material, especially for the use of the particular bridge in question, and that if payment was postponed until the time fixed in the original contract, the Bridge Company would suffer considerably, accordingly the Board of County Commissioners changed the time of payment, and even went to the extent of making a partial payment in advance of the actual commencement of work on the ground.

The obvious effect of such payment was to relieve the Bridge Company from financial embarrassement, therefore tended to lessen the possible liability of the Surety Company, rather than to increase it.

If we are permitted to indulge in speculation, we might say,—if this payment had not been made, the Bridge Company would not have been able to carry out it's contract, and the resultant breach of the conditions of the bond would have imposed on the Surety Company the responsibility of proceeding with the construction of the bridge or paying the resulting damages, so that the act of the commissioners, as before suggested, was one which tem-

porarily, at least, avoided a loss on the part of the Surety Company.

Referring to page 113 of the record, Mr. W. K. Armstrong identifies a letter written by the firm of Logan & Child to the National Surety Company, and on page 116, the witness Armstrong identifies a letter from one Joseph Magee to Logan & Child. On the same page the witness Armstrong testified that Magee was General Assistant Solicitor of the National Surety Company, and identifies his signature to exhibit 14. At the bottom of page 117, plaintiff made an offer of proof which was objected to solely on the ground that it was "immaterial and irrelevant under the issues in the case". In the letter of Assistant Solicitor General, Magee, referred to, this language used, "This company was merely surety on the bond in question and, of course, must be governed by the instructions and directions of its *indemnitors* (Italics ours), in all matters arising under it. We are definitely advised that the work was performed in strict accordance with the contract and specifications, and that it was done under the supervision of the County and its representatives, and that it was finally accepted as a fully completed contract by the County." This testimony is material and relevant when we come to consider the contention of defendant, that it was discharged from liability by reason of the provision of the Montana Code. If the National Surety Company was *indemnified,* then the provisions of Section 5673 are not available as a defense, and that Sec-

tion, under such circumstances adds nothing to the provisions of Section 5686 relating to sureties; and having taken the position that the question of indemnity was irrelevant and immaterial under the issues in the case, and having objected to the introduction of evidence on those two grounds and those alone, they would not now be permitted to contend that the evidence did not sufficiently show that they were in fact indemnified, nor at this stage of the case to switch their theory as indicated at the time the evidence was taken. We, submit, of course, that the letter from Mr. Magee clearly establishes the fact that the defendant, Surety Company was, and is indemnified, and that as a matter of fact, the Coast Bridge Company is the real party in interest, and that the Surety Company is merely a nominal party, carrying out the wishes and purposes of the real party in interest, and this is the actual and legal effect of the giving of indemnity under the Revised Codes of Montana.

Section 5648, Revised Codes, Montana, provides:

> "Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person."

Section 5654, Revised Codes, Montana, provides:

> "In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears":
>
> "L. Upon an indemnity against liability,

expressedly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable."

* * * * * * * * * * * *

"3. An indemnity against claims, or demands, or liability, expressly or in other equivalent terms, embraces the costs of defence against such claims, demands or liability incurred in good faith, and in the exercise of a reasonable discretion."

"4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defences, if he chooses to do so."

* * * * * * * * * * * *

"6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former."

Section 5655 of the Revised Codes, provides:

"Where one, at the request of another, engages to answer in damages, whether liquidated or unliquidated, for any violation of duty on the part of the latter, he is entitled to be reimbursed in the same manner as a surety, for whatever he may pay."

Turning now to the subject of Exoneration of Guarantors, we find this in Section 5678, Revised Codes:

> "A guarantor who has been indemnified by the principal, is liable to the creditor to the extent of the indemnity, notwithstanding that creditor, without the assent of the guarantor, may have modified the contract or released the principal".

And Section 5679, provides:

> "A guarantor is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor".

In interpreting these provisions, the courts have held that:

> "An indemnified guarantor or surety occupies the position of a principal."
>
> Moore vs. Paine, 12 Wend 123;
>
> Ten Eyck vs. Holmes, 3 Sand. Ch. 428;
>
> Smith vs. Steele, 25 Vt. 427, 60 Am. Dec. 276;
>
> Ehrman vs. Rosenthal, 117 Cal. 491.

The reason for these provisions is found in the fact that a surety and a guarantor as a rule stand upon a different footing. The term gurantor is applied particularly to mercantile transactions and the contract of the guarantor, is separte from and independent of the contract of the principal, and a guarantor is not indemnified by operation of law.

and the guaranty is based usually upon a consideration passing to the guarantor. While on the other hand the surety's contract is a part and parcel of the contract of the principal, and he is always indemnified. In that the law gives him a complete remedy against the principal in the event he is compelled to satisfy the principal obligations; see Section 5690, Revised Codes. As before suggested, this is not true as to a guarantor, but when a guarantor is in fact indemnified, then his position is exactly the same as that of a surety, and he cannot claim discharge except under the terms of the statute relating to sureties.

They cannot claim that we have not shown the extent of the indemnity. The presumption is that they were indemnified to the full penalty of the bond. They objected to our showing the character and extent of the indemnity, and they were afforded a full opportunity to go into that question; and if there is any uncertainty, at all, as to the extent of nature of the indemnity that uncertainty was created by the act of the defendant, and they ought not to be permitted to take advantage of it.

Section 5673, Revised Codes, provides:

> "A guarantor is exonerated, *except so far as he may be indemnified by the principal,* if by any act of the creditor, without the consent of the guarantor, the *original obligation of the principal* is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any wise impared

or suspended.

Notwithstanding—there may be some early decisions to the contrary, we submit that a fair, practical, rational and logical interpretation of this Section requires:

1. That the surety of guarantor must be without indemnity and must be without recourse on the principal before he can claim a discharge on account of any change in the contract.

2. That the change or alteration, if any, must be *by the act of the creditor,* and without the consent of the guarantor.

3. The alteration must be of the original *obligation of the principal,* or

4. The act of the creditor must be such as to impair or suspend the remedies or rights of the creditor against the principal.

None of these conditions appear in this case. As we have said, the guarantor is indemnified. If the Coast Bridge Company proceeded to construct the bridge without the consent of the Secretary of War, that was not the act of the creditor, and if it were the joint act of the Coast Bridge Company and Lincoln County, still it would not amount to an alteration of the *"Original obligation of the principal."* The question relating to the securing of permission of the Secretary did not touch the obligations of either party, but simply fixed the time, at most, when the contract should take effect. The obligation of the Coast Bridge Company was to construct a bridge according to the plans and specifica-

tions, and in no event can it be urged that the obtaining of such a consent, or failure to obtain it, altered the obligation of the principal. Nor can it be urged that by reason of the waiver or alteration of the original contract, the remedies or rights of the creditor against the principal were in any wise impaired or suspended. And what we had to say with reference to the change concerning the approval of the Secretary of War, if change it were, applies with equal force to the matter of the so-called premature payments. It can hardly be said that the *original obligation* of the principal was to accept payments, and the law says nothing about a change in the original obligation of the creditor, nor did the payments in this case impair or suspend any remedy which the creditor may have had against the principal. There is nothing in the Section just quoted which prevents the County from lawfully paying the contract price before the completion of the work, or precluded the parties from waiving the condition as to the approval of the Secretary of War. Nor in any event, can it be gathered from the recrod that the surety was prejudiced by any of these changes:

> "Prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistant with his rights, or which would lesson his surety."

So far as the payment was concerned, it was to be made in any event when the work was completed and defects in the construction of the bridge were not

discoverable at that time, so that the surety was not prejudiced in that respect by any act of the creditor, nor can it be claimed that the surety was prejudiced by the waiver or alteration of the original agreement as to the approval of the Secretary of War. Since that change "did not naturally prove injurious to the remedies of the surety or inconsistant with his rights" nor did it lessen his security.

> "In order for a surety company to be relieved of liability, it must appear that the breach of the assured contract, which it claims discharges its liability, is a substantial one, working pecuniary disadvantage to the surety or depriving it of some protection or privilege reserved in the bond."

Leiter v. Dwyer Plumbing & Heating Company, 133P. 1180 (Or.)

> "A surety on the bond of a contractor to erect a building under a contract permitting the owner to request alterations is not released from liability because of alterations".

Wolf v. Aetna Indemnity Co. of Hartford, Conn., 126 P. 470, 163 Cal. 597.

> "A provision in a building contractor's bond that all payments should be made, on written certificates of the architects, being for the owner's benefit could be waived by him without affecting the surety's Liability on the bond."

Southwestern Surety Ins. Co. v. Minnetonka Lumber Co., 148 P. 1038 (Okla).

"A stipulation in a building contract permitting alterations, held binding on the contractor and surety who was not discharged by alterations in the absence of evidence increasing his liability."

Dunne Inv. Co. v. Empire State Surety Co., 150 P. 405, rehearing denied 150 P. 411 (Cal).

The case of the Dunne Investment Company vs. Empire State Surety Company, 150 Pac. 405, is a modern case decided by the District Court of Appeals, April 21, 1915, and re-hearing was denied by the Supreme Court, 1915. In that case the court says after calling attention to the old rule that the surety may stand upon the strict letter of his bond, and that any change in the contract discharges him:

"The language of our Code section, above referred to, clearly declares that the creditor or obligee must do some act with reference to the contract to insure the faithful performance of which the security binds himself—that is, depart from its terms in some material respect—which will prejudice the rights of the surety as such. This appears to be the sounder principal, and is based upon the idea that, while there should not be added to the liability of the surety burdens which he has not by his undertaking assumed or become responsible for, yet if any variations made in the contract by the obligee under the bond, without the consent of the surety, have not had the effect of so prejudicing the surety as to injure or impair his remedies in

any degree or of lessening his security in any measure or are not in any sense inconsistant with his rights under his bond, then there does not exist under his bond, any just ground for the claim by the surety of a discharge from the obligations of his bond. By the principals thus stated, the building contract, which constitutes the measure of the surety company's liability, must be constructed, and thus the specific points made in impeachment of the judgment and the order appealed from tested".

In that case it is to be noted that it was an iron clad bond, particularly as concerning payments, and was evidently drawn with a view to protecting the surety against premature or unauthorized payments, in view of the fact that the class of work contracted for was such that liens might be filed against the structure and the sureties be held liable therefor —a condition which does not exist in the case at bar—yet in the case cited, the court says:

"In the first place, even if it may be said that the payment was made under or within the provisions of the contract but in violation of the terms thereof for the reason that the materials were not in the building when paid for and the payment made in the absence of a certificate of the architect, the answer is that the proof shows that said materials were actually used in the building and they and the payment for their freightage accounted for in a subsequent estimate and payment. Hence the surety company cannot put forth a substantial claim that it was injured or its rights impaired, and therefore

cannot complain. Bateman Bros. v. Mapel, 145 Cal. 241, 243, 78 Pac. 734. If, on the other hand, the payment was not within the terms of the contract—if in other words, it was a payment not authorized or prescribed by the contract—*then plainly it constituted merely an advancement of money made by the plaintiff upon its own personal responsibility and 'entirely without the terms of the contract' in which case the 'surety has no grievance, unless in substantial way its condition has been changed or a new liability is sought to be imposed upon because of such payment.'* Id.' And, as is manifest the effect of the advancement was not to change the condition of the appellant as a surety or to impose upon it a new or additional liability. Indeed the truth is that, *since the materials were assential to the construction of the building, it was to the benefit of the surety company that they be procured and placed in the building at the earliest practicable moment and thus, to that extent, prevent such delay in the cvompletion of the structure as might result in requiring said company to respond in the damages fixed by the contract for default in completing the building within the specified time.'*

On rehearing 150 Pac. Page 411, the supreme Court of California took note of the provision of the Califronia Code to the provision of our code, to the effect that the surety is exonerated in like manner with the guarantor, and says:

"Where the original obligation of the principal is so altered, or the remedies or rights of the creditor against the principal so impaired or

suspended it is thoroughly settled by our decisions that no inquiry will be allowed as to whether or not the surety was in fact injured thereby, and the cases relied upon by the petitioner here in this connection involve such a situation, as, for instance, the effective granting by the creditor to the debtor of an extension of time within which to pay a note, or a material change in the terms of a contract. But the opinion of the District Court of Appeal sufficiently shows that the facts of this case are not such as to bring it within the provisions of Section 2819 of the Civil Code. The original obligation of the principal was in no way attempted to be altered, and there was no act of the owner which in any way impaired or suspended the owner's right as against the principal. And the only provision of our Civil Code to be considered here is subdivision 2 of that section 2840, as the opinion assumes.

As applied only to such a case, there is nothing in the opinion which in our judgment is erroneuous."

See also Dodd v. Vocovich, 38 Mont. 188.

In substance the Supreme Court of California held, that the court of appeals was justified in that particular case in eliminating practically from consideration the provision relating to exoneration of the ~~grantor~~ guarantor, and of basing its decision upon the section relating to the exoneration of sureties, and the rule is there clearly established that the change must be in the original *obligation of the principal.*

In the case Baglin vs. Title Guaranty and Surety Co., 166 Fed. Rep. 356, the court says:

> "And the court of Appeals for the Fourth Circuit in Atlantic Trust Co. v. Laurinburg, 163 Fed. 695, used the following language:
>
> "Fully recognizing the rule of strictissimi juris as applying to contracts growing out of the ordinary relation of creditor and simple surety, we cannot and do not recognize this rule as applying to contracts underwritten by these bonding corporations, whose business it is (and a profitable one, too, it would seem, from the number organized and existing) to secure, for a ~~momentary~~ consideration the obligee against a failure of performance on the part of the principal obligor. In such cases, before such bonding company can be released, it must show that the changes made in a contract like this, operated injuriously to affect its own rights and liabilities * * The very reason for the existance of this kind of corporations, and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of the individual suretyship that give application for this rules by them taken away; that it is their business to take risks and expect losses. *If, with their superior means and facilities, they are to be permitted to take the risks, but avoid the losses by the rule of strictissimi juris, we may expect the courts to be constantly engaged in hearing their technical objections to contracts prepared by themselves. It is right, therefore, to say to them that they must show injury done to them before*

they can ask to be relieved from contracts which they clamor to execute.''

In the case of Williams vs. Pacific Surety Company, decided June 15, 1915, 149 Pac. Rep. Page 526, the Supreme Court of Oregon:

> ''The great weight of authority supports the doctrine announced by this court in the case of Bross v. McNicholas supra. But, in this day and age of corporate sureties, when the burden is lightened by, the payment of adequate premiums and, their final liabilities oft times secured, by counter indemnity, the strictness of the old rule is relaxed, and the modern day, surety company must show some injury done, before they can be absolved from the contract which they clamor to execute', Baglin v. Title Guarantey Co. (C. C.) 166 Fed. 356; Leiter v. Dyer Plumbing Co., 66 Or. 474, at page 482, 133, Pac. 1180.
>
> ''In the letter this court, speaking by Mr. Justice Bean, says: 'In order for the surety Co. to escape responsibility, it should appear that such company has been prejudiced by a breach of contract. The breach must not have been merely technical, that a substantial one, working a pecuniary disadvantage to the surety Co. or depriving it of some protection or privilege reserved in the bond.' It is needless to multiply citations. The instructions complained of are a correct expositions of the law.''

DID THE CHANCE IN THE PLANS OR IN THE MATTER OF THE PAYMENT DISCHARGE OR RELEASE THE SURETY?

Under the rule laid down in the case of Dodd v. Vocovich, 38 Mont. 188, supra, no change in the terms of the contract will release the surety unless such change result to the detriment of the surety, and the only change in this contract which could have resulted to the detriment of the surety, so far as the time of payment of the contract price is concerned, would be with reference to that condition of the bond, which garantees that the contractor will pay for all material, and labor, and of course, if the payment had been prematurely made, and the contractor had failed to pay for his material or labor, and liens were filed against the Bridge as a result; or individuals for whose benefit that clause was inserted in the contract, had commenced suits against the surety company to recover for wages or material, then it might be contended that the change as to payments resulted to the damage or detriment of the sureties, but not otherwise, because there is nothing in the bond or contract which in any way limits the county in making the payment.

IN SPECIFICATION 8 DEFENDANT COMPLAINS OF THE FAILURE OF THE COUNTY TO APPOINT AN ENGINEER TO SUPERVISE THE CONSTRUCTION OF THE BRIDGE.

Sections 1413 supra of the Revised Codes of Montana specifically and clearly prescribe the manner in which a Board of County Commissioners must discharge its duty when contracting for the construction of public bridges, and that Section 1414 relieves

the board of any duty of supervision, and substitutes for such supervision the requirement that the contractor shall furnish a bond conditioned for the faithful performance of his contract, and that the only duty imposed upon the Board of Commissioners is to select a set of plans and specifications suitable for the purpose, and to see that a valid and responsible bond is furnished. From the moment those conditions are complied with, both the contractor and the surety becomes insurers, and are charged with the duty of seeing that every material provision of the contract is carried out, and that the work is done according to such plans and specifications, and the whole duty of supervision rests upon them. And from these statutory provisions, the conclusion is inevitable that the Board of Commissioners, neither as a Board duly in session, or as individuals, have no power or authority to fritter away the benefits of the legislative enactments by any act or series of acts which would result in discharging the bond, or releasing the sureties, to the detriment of the public. It is presumed that the sureties and the contractor entered into their contract in view of the law in existence, and that such law became a part of the contract itself.

Section 1413, Revised Codes of Montana:

> "Contract for construction.—No bridge, the cost of construction or repairs, of which exceeds Two hundred dollars, must be constructed or repaired except on the order of the Board of County Commissioners; and when ordered to

be constructed to be constructed, or repaired it shall be done by contract. Before any contract shall be let as provided herein the Board of County Commissioners shall advertise for bids therefor at least once a week for two successive weeks in a newspaper of general circulation in the county, and a contract shall then be awarded to the lowest responsible bidder, who shall, before entering on the performance of the work, execute and deliver to the said Board an undertaking with two or more sureties, to be approved by the Board of County Commissioners, in a sum not less than twice the amount for which the contract is awarded. (Act approved March 2, 1903. Paragraph 77). (8th Sess. chap. 44.)

1413 Rev. Code Mont.

Sec. 1414:

"Contract awarded to lowest responsible bidder.—All bids must be sealed, opened at the time specified in the notices, and a contract awarded to the lowest responsible bidder. The Board of County Commissioners may, however, reject any and all bids. The contract and bond for its performance must be entered into and approved by the said Board, except in cases of great emergency, and by the unanimous consent of all its members, the said Board may proceed at once to construct, replace and repair any and all structures of whatever nature without notice. (Act approved March 2, 1903. Paragraph 78). (8th Sess. Chap. 44.)

1414 Rev. Code Mont.

It is admitted that the defendant in this case is a Surety Company, organized for the purpose of furnishing bonds, and is compensated; and it is to be presumed also, that it has taken the proper steps to indemnify itself against any default on the part of the principal, and therefore, the rules of law applicable to it are the same rules that would apply in case the contractor alone were the defendant in the action. Such is the trend of all modern decision, and this contention is particularly sustained by the decisions which are regarded as high authority in the State of Montana. In the case of Callan v. Empire State Surety Co., ...Pac., 978, 20 Cal. App., 483, the Supreme Court of California held that a bond to secure the performance of a building contract, attached thereto, which provided that it should be void if the contractors faithfully complies with the conditions of the contract, made the surety company a party to the contract. And that a surety bond might by reference incorporate other contracts or written instruments, or be condition for the performance of agreements contained in such instruments, in which case the bonds and contracts should be construed together. In Colorado, the Supreme Court held that a contract of surety-ship of a corporation organized to make bonds for profit, must be construed most strongly in favor of the obligee.

> Empire State Surety Co. v. Lindenmeier, 131 Pac. 437, 54 Colorado, 497.

In Kansas, the Supreme Court held that the law

does not have the same solicitude for incorporated surety companies, as it has for voluntary sureties, and such corporation being essentially insurers, the rule peculiar to suretyship did not apply.

> Chicago Lumber Co. v. Douglas, 131 Pac. 563, 89 Kan. 308, 44 L. R. A. (N. S.) 843.

In the state of Washington, the rule of strict construction in favor of sureties has been repudiated in so far as the liability of paid sureties is concerned.

> N. P. Ry. Co. v. Fidelity Deposit Co. of My., 134 Pac. 498, 74 Wash. 543;
>
> G. N. Ry. Co. v. Fidelity Deposit Co. of Maryland 134 Pac. 500, 74 Wash. 698.

In Wyoming the same rule is established in the case of United States Fidelity and Guaranty Co. v. Parker, 121 Pac. 531.

The court of appeals of the District of Columbia, in the case of U. S. Use of District of Columbia v. Bayly and Fidelity Company, 39 App. Cas., Dist. of Columbia, 105, adopts the same rule.

> "The doctrine that a surety company is a favorite of the law, and that a claim against it is strictissimi juris, does not apply where the bond or undertaking is executed upon a consideration by a corporation organized to make such bonds or undertakings for profit. While such corporations may call themselves 'sureties' their business is in all essential particulars that of insurers."

32 Cyc. 306, 307, 98 A. S. Rep. 838 and note.

The brief of plaintiff in error contains the following remarkable statement:

"The evidence shows a further material change. In the original plan, and in the modified plans and ~~in the modified plans~~, referred to in the bond under ~~date of December 20, 1'11, the bridge was to con-~~ date of December 20, 1911, the bridge was to be constructed under the direction of the County was a two-span link connected bridge. The riveted steel span bridge would have been firmer in place and would have tended to sustain the pier in its proper position, whereas the link connected span would buckle under any end pressure and would not resist the weight of the pier."

There is no evidence whatever that the bridge was constructed under the direction of the county; nor is there any evidence in the record to enlighten us concerning the technical question whether "a riveted steel" bridge would have been firmer in place or would have tended to sustain the pier in its proper position; nor whether a "link connected span" would buckle under end pressure or would not resist the weight of the pier. Although a number of expert witnesses were called by the plaintiff in error no evidence along this line was offered or introduced and unfortunately geographical conditions prevent us from cross examining counsel concerning his knowledge of this technical subject, or

to inquire into the difference if any between the "*pin* connected span" mentioned in the specifications attached to the contract and in the assignment of errors and the "*link* connected span" referred to in the brief.

On page 44 to page 50 of their brief counsel undertake to shift the responsibility for the construction of the bridge from the Bridge Co. to the County. The court below found that the Bridge Co. was negligent in the manner set forth in the complaint and we find nothing in defendants assignment of errors which justifies them in urging this point at this time and we submit that this court is without jurisdiction to consider this phase of the case, however we will briefly reply to the counsel's contention as we think it is wholly without merit regardless of the question whether the alleged error of the trial court is properly before this court for review.

The execution of the bond in question is admitted by the answer, and the proof as to the execution and delivery of the contract involved, offered by the plaintiff, has not been controverted by the defendant. We submit that the proof is conclusive that the bridge in question collapsed, and that it collapsed in consequence of the failure of the defendant, Coast Bridge Company, to drive the piles in the center pier in accordance with the specifications; but we are met with the extraordinary contention on the part of the defendant (if we understand the purport and significance of its case), that we are in

error in our theory as to the cause of the destruction of the bridge, but that such destruction was caused by the failure of the bridge company to sink the center concrete pier to such a point that it would be able to carry the structure with safety. In other words, if we understand the defendant's position, it argues that while the negligent act set forth in the complaint, was not the cause of the injury, another negligent act on the part of the defendant was in fact the cause. If we assume for the moment that the National Surety Company was, and is a party to the contract, and therefore, bound by all its terms, not necessarily as a surety in the ordinary sense of that term, but as an insurer, or a principal; and we further assume, as the evidence clearly shows that the specifications were left open so that the party constructing the bridge could use its judgment and discretion in the matter of sinking the piers to a solid foundation, then in the event the court should find as a fact that the collapse of the bridge was not due to the particular act of negligence or omission specified in the complaint, but was due to the failure of the Bridge Company to sink the concrete pier to solid foundation, then it would clearly be the duty of the court to approve the ruling of the trial court treating the complaint as amended, *to conform to the proof,* for the concrete pier and the piles were so closely allied as to constitute in effect one thing. We do not think it can successfully be contended that a defendant may escape liability by admitting to all intents and pur-

poses that the injury was caused by his negligence, but not by the particular act of negligence set forth in the complaint. Of course the Montana Code of Civil Procedure (Sec. 6585 R. C.) provides that no variance shall be deemed material unless the adverse party has been misled to his prejudice, and the decisions of our Supreme Court are all to the effect that no variance is fatal unless it amounts to a failure of proof; and the Supreme Court of Montana has further decided that a defective allegation, or a want of an allegation in a complaint is cured if the answer supplies such allegation.

> "Where an omission in a complaint is covered by an allegation of the answer, the defect is cured." Wilson v. Harris, 21 Mont. 374, 54 Pac. 46.
>
> "An answer which assumes that the complaint contains an allegation, supplies the omission."
>
> Lynch v. Bechtel, 19 Mont. 548, 48 Pac. 1112;
>
> See also Crowder v. McDonald, 21 Mont. 367, 54 Pac. 43;
>
> Hamilton vs. Great Falls St. Ry. Co., 17 Mont. 334, 42 Pac. 860.

By analogy, it is not unreasonable to say that if plaintiff's case does not establish the contract breach, but that defendant's proof does, it would be in furtherance of justice to direct an amendment of the plaintiff's complaint to conform to such

proof; and that such amendment shall consist in adding to the complaint an allegation of the additional and independent act of negligence, in view of the ruling by our Supreme Court that where two or more acts of negligence are alleged, not concurrent or interdependent, proof of any one of the acts is sufficient to sustain a verdict. Nor could it be successfully contended for one moment, that the defendant was misled when it comes into court and says: "The destruction of your bridge was not caused in the way you say it was, and we know just how it was caused, and we will now proceed to tell you."

Where there is a defect in a pleading which would be fatal on demurrer, yet if the issue be such as necessarily requires proof of the facts so defectively alleged, or omitted, and without which the verdict would have been given, then the omission or defect is cured by the verdict.

Hershfield v. Aiken, 3 Mont. 442;

See also 1 Am. Dec., 210.

Defects in pleadings are waived where the testimony relating thereto is received without objection.

Hogan v. Stuart, 11 Mont. 498, 28 Pac. 969.

When a cause has been tried, and evidence has been admitted without objection which tends to prove a material fact which should have been pleaded, but was not, the deficient pleading will be

deemed to have been amended to conform to such proof.

Ellinghouse v. Ajax Livestock Co. (Mont.) 152 Pac. 381;

Concurring Opinion of Justice Holloway on page 486;

Moss v. Goodhart, 47 Mont. 257, 131 Pac. 1071;

Lackman v. Simpson, 46 Mont. 518, 129 Pac. 325.

If these principles here announced, which were the law of this state at the time, apply, then the pleadings in this case will as a matter of law, be considered amended so as to enable the plaintiff to recover damages for the defective construction of the concrete pier, in the same manner as if that defective construction had been specifically named in the complaint filed.

That the Bridge Company undertook the entire responsibility of constructing the bridge in such a manner as to make it safe and secure, we think there can be no question, since the county had no engineer upon the ground, and did not in any manner seek to interfere with, or control the judgment of the Bridge Company. Mr. Raynor, the Bridge Company's engineer, testified (p. 103), that the plans of the bridge showed several feet more of concrete pier than was actually put in, and that the plans simply

designated a particular depth of concrete as a general basis, and that it was not intended that the excavation should be sunk to such a point as to enable the Bridge Company to use a pier of the exact height of that shown on the plans, but that the pier might be shortened or lengthened to meet the actual physical conditions of the river bottom when the work of construction should be commenced, and to that end the plans in that respect were left open, and provision made for the payment for additional concrete, or for deduction from the contract price accordingly as the pier might be lengthened or shortened; and all of their witnesses, who pretended to be qualified as experts, including Mr. Raynor himself, testified that it would have been proper engineering to have excavated three or four feet of apparently loose gravel, and placed the bottom of the concrete pier at that point, and if it would have been good engineering to have done this, then we are justified in assuming so far as the contention of the defendant is concerned, that a safe and permanent structure would have resulted, and that the bridge would now be standing and servicable for the use of the public. Of course, as before suggested, we conted most earnestly that the proof shows that the collapse of the bridge was the result of the failure on the part of the Bridge Company to drive the piles to refusal, and we have indulged in the foregoing argument only for the purpose of getting before the court our contention that in no event can the Surety Company escape liability.

DID THE ACCEPTANCE OF THE BRIDGE, OR THE PAYMENT THEREFOR, RELEASE THE SURETY?

As before suggested, of course, there could be no acceptance under the laws of Montana that would discharge the surety of the contractor, in the event the contractor did not build the bridge according to specifications. To hold that a mere acceptance or payment for the bridge would have such effect, would be to place in the hands of the county commissioners the power to defeat the very purposes for which the bond was given, and the Board of Commissioners being a board of limited authority, no estoppel could grow out of dealings with it as against the public. In the matter of the construction of bridges, it must be borne in mind, the county is not dealing as a municipal corporation in its proprietory capacity. In other words, it is not dealing with its own property in the ordinary meaning of the term, but is acting as a trustee, not for the taxpayers of the county, but for the public generally, which includes the people of the entire state. In other words, it is a governmental arm of the state (State v. Amandson, 23 N. Dak. 238, 135 N. W. 1117), and the same rules that apply with reference to the acts of state officials or officials of the federal government apply to county commissioners, when they are dealing with subjects concerning the public highways.

In the case of St. Louis Board of Education v. National Surety Co., 183 M. 166, 82 S. W., 70, the

court held that the payment for a heating plant installed by a contractor for a school district did not release the surety company, and although defects in the plant were not discovered until the following winter, suit upon the bond might be maintained, and the same principle was laid down in the case of

> Newark v. N. J. Asphalt Co., 68 N. J. L. 458, 53 Atlantic, 294;

and in the case of State ex rel Workmen v. Goldwait, 172 Ind., 210, 19 American & English Ann. Cas. 737, the court held:

> "No estoppel can grow out of dealings with public officers of limited authority."

Mr. Brant in his work on suretyship and guaranty, citing numerous authorities, laid down this general rule:

> "Alterations to discharge the surety must be made by the parties to the principle contract. Where they are made by the architect without the owner's consent, the surety is not released."

And in the case of McCoy v. Able, 30 N. E. 530; re-hearing, 31 N. E. 453, the Supreme Court of Indiana says:

> "The first question presented by specification of error, found upon the ruling denying a new trial, is to the effect of the estimates of the engineer and the acceptance of the Board of Commissioners. We cannot agree with counsel that the engineer's estimate is conclusive,

for we understand it to be settled by our decisions that parties cannot, by agreement in advance, oust the jurisdiction of the courts, and make conclusive the estimate of an engineer or other person."

In the case of Hart v. U. S., 95 U. S. 316, the rule is laid down as follows:

"The government is not responsible for the laches or the wrongful acts of its officers (cases cited). Every surety upon an official bond to the government is presumed to enter into his contract with a full knowledge of the principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him that it's officers shall perform their duties. A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect."

To the same effect see

United States v. Boyd, 15 Peters, 208;

Jones v. U. S., 18 Wall. 662;

Bobban v. U. S., 8 Wall. 269;

Hart v. U. S., 95 U. S. 218;

Minturn v. U. S., 106 U. S. 444;

See also B. Co. Com. v. O'Connor, 35 N. E. 1006 (Ind.), Rehearing 37 N. E. 16;

Am. Surety Co. v. Scott & Co., (Okla), 90 Pac., 7.

In the case of Guaranty Company v. Press Brick Co., supra, the Supreme Court of the United States held that the rule of strict construction should be relaxed in the case of a surety company for compensation, and such bond should be construed liberally in favor of the obligee. We think that so far as this phase of the case is concerned, that it is absolutely set at rest by the case of U. S. v. Walsh, 52 C. C. A. 419. The decision was by the Circuit Court of Appeals, 2nd circuit, and we will quote the syllabi in full.

> "1. Contract for Constrution of Government Work—Construction—Waiver of Breach by Officers.
>
> "A contract for the construction of a dry dock for the United States required such construction to conform in all respects to the plans and specifications which were attached and made a part of the contract, and provided that such plans and specifications should not be changed in any respect except upon a written order of the bureau of yards and docks, and by written agreement between the parties. It further provided that the government should have a competent civil engineer in charge of the work, who should have the privilege of inspecting at all times the materials and work, with power to reject either materials or work deemed by him unsuitable or not in conformity with the contract or plans and specifications. Held,

that such engineer could not bind the United States by consenting to deviation from specific requirements of the specifications as to workmanship or materials, which fact the contractors were bound to know, and that no action or neglect of his or his subordinates could operate as a waiver or estoppel on the part of the government to relieve the contractors from liability for such departures from the requirements of the contract.

"2. Same—Effect of Acceptance—Ignorance of Defects.

"The contract further provided that the contractors should not be entitled to full and final payment until the dock had been tested by officers designated by the government, and accepted after their approval. Held, that an acceptance and payment of the contractors after such test did not conclude the government if made in ignorance of facts which, if known, would have led to a refusal to accept, and that, where the final test was made under conditions which did not permit structural departures from the specifications to be discovered by the officers making it, the government was not chargeable with notice of such defects, to preclude it from holding the contractors liable therefore on their subsequent discovery, because of the knowledge of or consent to the same by its engineers in charge of the work, who, as the contractors were bound to know, had no authority in the promises.

"3. Same. The acceptance by the engineer, or his acquaintance as the work proceeded, and

the final acceptance of the dock by the board of officers designated by the navy department, are important evidential facts tending to prove that the work and materials complied with the contract; but they are not of controlling effect, and neither such acceptance nor the payment of the contract price necessarily deprives the government of its right of action for a breach of the contract in material and substantial particulars.

"4. Same. Discharge of Surety—Modification of Plans. A surety for the performance by the contractor of a building contract, which provides that changes may be made in the plans and specifications by written agreement of the parties; is not discharged from liability by modifications so agreed upon which are not so extensive as to radically change the contract and subsequent a different one."

The defect in the instant case was latent as stated in the complaint. It will be observed that in this case a number of other questions pertinent here have been decided favorably to our contentions.

In any event it is our contention that matters in discharge or release of a surety are matters of defense and the defendant is not entitled to prove such matters unless pleaded. The force of this contention will be readily seen when we refer to the one proposition of obtaining the consent of the Federal Government for the construction of the bridge; in support of this contention, we cite the Third Southerland Code pleading, paragraph 4970;

U. S. v. Bradley, 10 Peters, 343, 9 L. Ed. 448;

Mayor of Alexandria v. Moore, 1 Cranch C. C. 440.

FEDERAL CASES CITED BY COUNSEL FOR PLAINTIFF IN ERROR—NOT IN POINT.

On pages 26 to 33 inclusive, of their Brief, counsel quote at length from the decisions of the United States v. Freel, 186 U. S. 309; 46 L. ed. 1177, and American Bonding Company vs. U. S., 167 Fed. 910, and lay great stress upon the importance of these cases as authority here. We submit that the cases are not in point. In the first place, as hereinbefore suggested, whatever changes were made in the bridge were made by the Bridge Company, and the contract was not altered or modified except in the particulars set forth in the complaint. Counsel has failed to distinguish between a change or alteration of the terms of the contract, a voluntary departure from the plans and specifications by the construction company. It is not to be lost sight of at any stage in this case, that the bond was given to insure the faithful performance of the contract by the construction company, and it is new doctrine to say that a violation of the terms of the contract by the construction company, releases the surety. But, be that as it may, and assuming for the purpose of argument that changes were made during the course of construction, and that the changes were made at the instigation of the county, and that the acts of the

county in that respect constituted a binding modification of the original agreement, still the authorities are not in point, and are not available to the plaintiff in error to bring about a reversal of this case.

In the case of United States vs. Freel, supra, the contract in question contained this clause:

> "* * * and that if at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimate actual cost thereof, which the contractor shall receive if any * * *"

The theory upon which the surety company is bound by alterations in the original contract is that the surety is a party to such contract or has delegated to the contractor, the authority to bind him in some way, and in the case cited, the clause, instead of according to the United States, the right to order such changes as it might desire, actually took away from the Government whatever authority it would have had in the absence of any clause concerning modifications, and the Supreme Court rightly held that the changes ordered by the department had the effect of discharging the surety.

In the case of American Bonding Company vs. United States, supra, the contract contained this

clause:

> "If at any time it shall be found advantageous or necessary to make any change, alteration or modification, in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract."

This clause also had the effect of depriving the Government of the right to order any changes or alterations, even in an immaterial matter, and depriving the Government of the benefit of the modern rule that changes or alterations in the original contract do not have the effect of discharging or releasing the surety, unless such change or alteration was actually prejudicial to him, or that his security was lessened or his liability increased. In the case at bar, however, a different condition exists. It is our contention as before suggested, that the contract, plans and specifications were all made of and constituted a part of the bond, by specific reference in the bond, and that the surety is bound by the terms of the contract as well as those terms found in the language of the bond itself, and that accordingly, the third sub-division of the contract found on page 67 of the record, is binding upon the surety, and that under the terms of that clause, no agreement was necessary either on the part of the contractor or the surety, but the power was conferred upon the county to "order" such alterations, deviations, additions or omissions not hereinabove provided for, from the contract specifications or plans, as it might

see fit. Under this agreement it was not necessary for any agreement in writing to be made altering the original contract and the legal effect of the contract was to constitute the bridge company the agent of the surety company to enter into and negotiate contracts for such alterations or deviations as the county might require, and therefore, throughout the whole transaction, the surety company was a party. It is also to be observed in this connection that there is no other provision in the contract in any wise restricting or limiting the operation of the clause in question, and unlike the federal cases cited above, the defendant in error would in any event be entitled to the benefit of the modern rule which has modified to a very great degree the old rule of strictissimi juris. In this connection, the fact must not be lost sight of that the only change, material or otherwise, to which the county was a party, is the change evidenced by the modified written contract, the performance of which by the contractor, was expressly and in terms guaranteed by the bond in question, and certainly it cannot be urged that a surety is discharged by an alteration, when the bond upon which he is sued was given for the very purpose of securing the faithful performance of the contract so altered.

COLLAPSE OF BRIDGE—DEFENDANTS THEORY AS TO CAUSE FANCIFUL AND UNTENABLE.

Under subdivision "V" pages 44-50 inclusive, counsel discuss the causes of the collapse of the

bridge and on page 46 they make the following remarkable statement.

"It certainly must be said that as to the piling sheared off, the complaint of the plaintiff that they had not been driven sufficiently deep must be disregarded because no matter how deep they would have, all they could have done was to shear off."

On the same page counsel say "it seems to us that it is nothing but the rankest sort of conjecture for the witness Kenedy to attempt to make a case for the plaintiff by giving it as his opinion that the pier would not have toppled over if the piling had been driven to a point wherewith the blow of a two thousand pound hammer falling twenty feet the penetration would not have exceeded one inch."

It is an old saying of mining men that no man can see in to the ground beyond the point of his pick and the information contained in counsel's brief to the effect that no matter how deep the piling was driven they were bound to shear off, is certainly illuminating, and argues a resourceful knowledge of the physical condition of the bottom of the Kootenai River, on the part of counsel that is astonishing to say the least. To the ordinary person it would seem that Mr. Kennedy's theory is sound and logical. His testimony was to the effect that the high water caused a scouring of the gravel around and under one end of the pier and on account of the fact that the pilings had not been driven to refusal that is to say through the loose and shifting gravel the scouring of the river bottom continued until the points of

the piling on one side of the pier were deprived of support. The result was that the pier toppled, slipped from its position and by reason of the superimposed weight of the concrete and bridge spans the piles sheared off.

Mr. Kennedy gave it as his opinion, based on a technical knowledge of bridge construction, that if the piling had been driven in accordance with specifications the undermining would not have occured and the bridge would not have collapsed. It is only fair to assume as Mr. Kennedy apparently did assume that at some point below the point where the points of the pilings finally rested the piling if driven according to specifications would have passed through the loose shifting stratum of surface gravel and rested upon or penetrated solid gravel or rock in place below the zone of scouring or at a point where the character of the gravel or bed rock was such as to resist the scouring effect of the river. In that event the pier could not and would not have toppled even though the scouring continued down to the points of the piles.

It seems to us that counsel and not Mr. Kennedy are speculating as to the cause of the collapse and in any event by the failure of the Bridge Company to drive the piling to refusal we are deprived of the means of knowing positively and to a moral certainty what would have been the condition of the bridge at this time had the Bridge Co. performed its part of the contract.

We cannot refrain from again urging that so far

as the phase of the case is concerned plaintiff in error has been foreclosed by reason of the fact that they have not assigned the finding of the court in this respect as error and have not brought the evidence with respect to this phase of the case before the court for review.

In this connection it cannot be contended that the piling were not a sufficient length to permit the driving to refusal. The Trial Court at page 122 found that the excavation was about eight and a half feet deep in sand and gravel and that the piles were probably driven four feet and that the piling ordered by the superintendent were 22 feet long and "62 of them were driven, it would seem from depths varying from three feet five inches to three feet, eleven inches" and in this connection the court takes notice of the remarkable and significant fact (same page) that the water was gradually rising and although 62 piles were driven, the driving of each pile ceased when its top was practically at water level—in other words not the specifications nor the resistance which the pile met during the course of the driving controlled the question as to how deep each pile should be driven but that proposition seems to have been controlled entirely by the depth of the water in the cofferdam—in other words it is apparent that the Bridge Co., its employees and agents were not influenced by the plans and specifications but rather by a desire to avoid the splashing which would follow an attempt to operate the pile driver in the water contained in the cofferdam or the expense

or inconvenience of pumping out the cofferdam to permit of the unobstructed driving of the piles. There was nothing in the specifications which required the company to leave piles sticking up to the full height of the cofferdam and all the piling projecting above the excavation in the sand and gravel was available for further driving to the point of refusal. In fact the specifications required that after the driving of the piling were complete they should be cut off at an elevation of 24 inches above the bottom of the concrete piers and abutments. See Record p. 23.

Thus it will be seen that if the company had been disposed to drive the piling to refusal each 22 ft. pile could have been driven 18 ft. further before the contractor would have been required to resort to the use of a "follower" or additional piles in order to get the point down to the point of refusal.

It is also to be noted that the specifications (page 24) provide that if necessary the piles should be shod with steel or cast-iron shoes and properly ~~ar~~ ringed ranged at the top to prevent their splitting or broming, and that all piles broken, split, or badly broomed should be withdrawn and replaced by other piles.

The Record recites at page 97 "There was also evidence introduced on behalf of the plaintiff that piles were not driven to a point where under the blow of a two thousand pound hammer the penetration would not exceed a half inch and that the piles were not ~~arranged~~ ringed or shod and were broomed but little if any.

The court found these facts of the plaintiff in error (Record page 122).

AS TO THE EFFECT OF THE CLAUSE PROVIDING THAT THE CONTRACT SHOULD NOT GO IN TO EFFECT UNTIL THE PLANS AND SPECIFICATIONS WERE APPROVED BY THE SECRETARY OF WAR.

Under subdivision IV pages 44-4‘ inclusive counsel earnestly contend that the clause in the contract to the effect that the contract could not take effect until the plans and specifications should be approved by the Secretary of War, amounted to a condition precedent which the plaintiff must allege and prove before being entitled to a recovery.

It is not argued that the construction of the bridge by a state without such approval would amount to a nuisance or be an unlawful act. Hence we do not deem it necessary to quote from that long line of decisions of the Federal Court holding that the state has a right to construct bridges over navigable or unnavigable streams subject only to the paramount right to control interstate and navigable water for the purpose of Federal Commerce. We take it that counsel will concede that this right has always rested in the state and that unless the stream is shown to be navigable water of the U. S. no act of Congress was necessary to authorize the construction of the bridge and likewise the approval of the Secretary was unnecessary so far as the Federal government was concerned and that the act of Congress providing that whenever permission might

there/after be granted to any peson, by act of Congress, to construct a bridge the plans and specifications should be submitted to the Secretary of War for approval, has no application to a case where a state acting under the sovereign powers as such seeks to make available its public high-ways by the construction of bridges across the streams within its borders and we further assume that plaintiff in error will concede that the question of navigability or non-navigability under the Federal laws is a question of fact and that until the U. S. has taken the control stream over the presumption must prevail that it is not navigable water of the U. S. The Record in this case page 118 recites "and no evidence was offered or introduced by either of the parties touching the question of navigability or non-navigability of Kootenai River at the point where the Rexford bridge was constructed or elsewhere."

As we understand their present contention, the claim is made that by reason of the presence in the contract of the clause referred to we cannot recover unless we show by our pleadings and testimony that the approval of the department was had—regardless, absolutely, of the question whether the plaintiff in error was prejudiced by the failure to obtain such approval. We submit that this contention is without merit. There is absolutely nothing in the records which requires the County to secure the approval of the Secretary of War. As aptly suggested by the Trial Court at page 124 "Then to, so far as this action is concerned to secure such an approval

if not more was as much the contractor's as was the builder's. The former could not lawfully perform its contract prior to approval. A surety engages its principal, lawfully performed. And if the later unlawfully performs its contract unless the builder knew of and acquiesced in such unlawful performance. And upon the surety if the burden to approve this".

The attention of the court is called to the fact that nowhere in the record was this question raised until, apparently, the case had proceeded to the point of argument and it then came too late. Be that as it may, counsel now make the curious contention that the surety was entitled to the benefit of the advice and opinion of an officer connected with the War Department of the United States and that the question whether this thirty thousand dollar bridge would be constructed all depended whether the War department would consent to examine the plans and specifications and place upon them its seal of approval. It is conceded that no evidence was offered touching the navigability or non-navigability of the Kootenai River and the presumption must prove that it is and was non navigable water. Assuming for the purpose of argument that the plans were not approved then according to defendant's contention the alleged contract was a nullity even though the stream was not navigable and the Secretary was without jurisdiction to examine or approve the plans, in other words the parties were placed in the anomilous position of having a perfect right to con-

struct the bridge but having the construction of the bridge defeated by reason of the failure of an official to approve the plans who had no right to either approve or disapprove them. It cannot be claimed that the parties at the time entered in to the contract were influenced by any such considerations as those contended for by plaintiff in error at this time. A contract based on the idea of securing action on the part of a high governmental department merely for the benefit of a private individual or corporation regardless of the governments interest in the subject matter would be contrary to public policy if it could not be characterized by even stronger terms.

There is nothing in the record or in the situation which justifies the contention that the Surety Co. could have been influenced by the desire to secure the benefit of the opinion of the Chief Engineer of the War Department. When it signed the bond it was influenced only by its confidence in the ability of the Bridge Co. to design and construct a proper bridge, by the premiums which it was paid for executing the bonds and by such indemnity as it may have taken over to protect itself against ultimate liability and on the part of the bridge Co. and the County the only consideration which could have influenced them or either of them in inserting the clause in contract was to protect the parties against loss, inconvenience or prosecution in the event it should turn out to be a fact that the Kootenai River at the point indicated was navigable water of the

U. S. and it may well be that the parties at the time believed that the government had jurisdiction over the stream. In pursuance of that belief they secured a passage of an act of Congress authorizing the construction of the bridge and we have a right to assume that the Bridge Co. as a matter of fact submitted to and obtained the approval of the War Department the plans and specifications under which the bridge was constructed.

But regardless of the question whether the plans were or were not approved the fact is that the Bridge Co. proceeded with the construction of the bridge to the point where it claims completion thereof. It received the warrants of Lincoln Co in full payment and it cannot now be heard to claim that it acted unlawfully. The Surety Co. undertook and agreed to the effect that the bridge Co. will lawfully carry out and perform each and every condition of the contract, plans and specifications. And having received all the material benefits of the contract it would be unconscionable to permit them to escape liability by the plea that the approval of the Secretary of war was not obtained especially when it is exceedingly doubtful *first* as to whether the approval was in fact obtained or not and *second* whether it was the duty of the County or the Bridge Co. to secure such approval.

The cases cited by counsel are not in point. Those cases relate to executory contracts and none of them were cases where the contract had been completely executed and the party raising the question had re-

ceived full benefit of the contract. The case of California Raisin Growers Asso. vs. Abbott, 117 Pacific 767, clearly, concisely and correctly states the rule applicable to this case.

> "By their answers appellants aver that the contracts were delivered to plaintiff in escrow, and were not to become operating until 85 percent of the raisin-bearing acreage of the state was secured by contract; that such percentage was never brought within the control of the plaintiff; and that therefore the contracts could not be enforced. A complete answer to this contention is that the growers did deliver their raisins under the contracts, and accepted money from the plaintiff. Even if delivery of the contracts in escrow, with the proviso alleged were tolerated (and it is not—Civ. Code, 1056, 1626, 1627), the acceptance of the terms of the contracts by the producers of raisins waived the escrow agreement."

It cannot be successfully maintained that the purpose in the mind of the Surety Co. in having inserted in the contract the clause referred to was to secure the benefit of the Chief Engineer of the War Department since it must have known that the governments interest in the matter was only to see that the bridge was of such a character that when errected it would not obstruct navigation. There is no contention in this case either on the part of the plaintiff or defendant that the specifications were not complete in every respect. On the contrary, the evidence on both sides show that the plans and spec-

ifications were entirely sufficient to permit of the construction of a perfect bridge and one that would have stood had the specifications been carried out; particularly according to Mr. Raynor the man who drew the plans, the specification were left open as to the center pier so that it might be carried down indefinitely to the point of resistance and absolute security.

Respectfully submitted,

J. B. POINDEXTER,
Attorney General, Helena, Montana.

W. H. POORMAN,
Assistant Attorney General, Helena, Montana.

JAMES M. BLACKFORD,
Libby, Montana.

SIDNEY M. LOGAN,
Kalispell, Montana.

Attorneys for Plaintiff and Defendant in Error.